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Nos. 87-253, 87-431, 87-462 & 87-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

(and three consolidated cases)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY (NATIONAL PEARL)[1] PEOPLE FOR THE AMERICAN WAY ADVOCATES FOR CHILDREN OF NEW YORK, INC. ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS NATIONAL CONGRESS OF PARENTS AND TEACHERS SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S. SOCIETY FOR THE SCIENTIFIC STUDY OF SEX VERN L. BULLOUGH SUPPORTING APPELLEES

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American Ethical Union
American Humanist Association
Americans for Religious Liberty
Board of Church and Society of the United Methodist Church
Central Conference of American Rabbis
Committee for Public Education and Religious Liberty
Council for Democratic and Secular Humanism
MC PEARL—Monroe County, New York PEARL
Michigan Council About Parochiaid
Missouri Baptist Christian Life Commission
Missouri PEARL
Nassau-Suffolk PEARL
National Association of Catholic Laity
National Council of Jewish Women
National Education Association
National Service Conference of the American Ethical Union
New York State United Teachers
Ohio Association for Public Education and Religious Liberty
People for the American Way
Public Funds for Public Schools of New Jersey
Union of American Hebrew Congregations
Unitarian Universalist Association

QUESTION PRESENTED

Does the Establishment Clause permit the Government to pay religious organizations to promote government policies that such organizations teach as articles of religious faith?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Section 2006 of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z-5(a):

> "An application for a grant for a demonstration project for services under this subchapter . . . shall include—
>
> . . . .
>
> (21) a description of how the applicant will, as appropriate in the provision of services—
>
> . . . .
>
> (B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector . . . ."

INTEREST OF *AMICI CURIAE*

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the common objectives of preserving freedom and the separation of church and state in public education. National PEARL includes, among other organizations, the Committee for Public Education and Religious Liberty, which joins this Brief on behalf of its member organizations, some of which are also members of National PEARL.[1]

[1] The members of the Committee for Public Education and Religious Liberty include: American Ethical Union; N.Y. Americans for Democratic Action; Americans for Religious Liberty; Aspira; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Community Church of New York; Council of Churches of the City of New York; Council of Supervisors and Administrators; Episcopal Diocese of Long Island, Committee on Social Concerns and Peace; Humanist Society of Greater New York; Jewish War Veterans, New York Department; National Service Conference of The American Ethical Union; New York Federation of Reform Synagogues; New York Jewish Labor Committee; New York Conference of the Society for Ethical Culture; New York Society for Ethical Culture; New York State Congress of Parents and Teachers; Public Education Association; Union of American Hebrew Congregations, New York State Council; United Americans for Public Schools; United Community Centers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; Workmen's Circle, New York Division; Monroe Citizens for Public Education and Religious Liberty; and New York State United Teachers.

People For the American Way is a non-partisan citizen's organization established to promote and protect civil and constitutional rights. People For the American Way was founded in 1980 by a group of religious, civic, and education leaders devoted to our heritage of tolerance and pluralism; it now has 270,000 members nationwide. The organization's primary mission is to educate the public on the importance of our democratic tradition and to defend that tradition against attacks by those who would impose sectarian constraints on a free society.

Advocates for Children of New York, Inc. (AFC) is a 17-year-old voluntary, non-profit children's rights organization. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in the courts and the legislature, and through public advocacy activities. AFC joins this Brief because of its interest in promoting full discussion of information and ideas in educational settings.

The Association for Supervision and Curriculum Development is a 76,000-member association of principals, teachers, central office administrators, and professors who care deeply about assuring a quality education for all students. As practicing educators, the Association's members and their students are directly and adversely affected by decisions that limit access to complete and accurate information.

Vern L. Bullough is Dean of Natural and Social Sciences of the State University of New York at Buffalo. He has extensively researched and written on church-state conflicts over human sexuality. He joins this Brief out of concern that the challenged statute improperly permits religiously inspired restrictions on the complete and objective information on sexuality that should be available to adolescents.

The National Association of Elementary School Principals is a professional organization of more than 23,000 elementary and middle school administrators. Its members are responsible for the education of approximately 25 million elementary school students throughout the country.

The National Congress of Parents and Teachers (National PTA) is a nationwide organization with a current membership of over 5.8 million parents, teachers, and concerned citizens. The primary purpose of the National PTA is to promote the welfare of children at home, in school, and in the community.

The Sex Information and Education Council of the U.S. (SIECUS) is a private, non-profit, educational organization established to promote healthy sexuality as an integral part of human life. It believes that accurate information, comprehensive education, and positive attitudes toward sexuality enhance individual physical and mental health and promote communication and caring within our society. SIECUS provides information and education on sexual matters through a clearinghouse and resource center.

The Society for the Scientific Study of Sex is an international organization dedicated to the advancement of knowledge about sexuality. The Society brings together an interdisciplinary group of professionals who believe in the importance of both the production of quality research and clinical, educational, and social applications of research related to all aspects of sexuality.

INTRODUCTION

At issue in this case is the constitutionality of the Adolescent Family Life Act (AFLA), a federal statute that provides public funds to religious organizations, among other groups, for care, education, and counseling services aimed at preventing adolescent premarital sexual relations and pregnancy. Plaintiffs—federal taxpayers, clergy members, and the American Jewish Congress—filed suit in the U.S. District Court for the District of Columbia, alleging that AFLA on its face and as applied violated the Establishment Clause. The District Court held AFLA unconstitutional insofar as it involved religious organizations in the provision of services. The District Court subsequently held that the statute's references to religious organizations were severable from the rest of the statute. The case is before this Court on appeals by the Government and intervenor-defendant United Families of America from the District Court's ruling that AFLA violates the Establishment Clause, and on plaintiffs' cross-appeal from the ruling on severability.

STATEMENT OF THE CASE

1. Congress enacted AFLA, 42 U.S.C. §§ 300z to 300z-10 (1982), to replace the Health Services and Centers Amendments of 1978 (Title VI).[2] AFLA's sponsors, Senators Jeremiah Denton and Orrin Hatch, maintained that Title VI was inadequate to combat adolescent premarital sex and pregnancy. They asserted that Title VI did not sufficiently involve private entities, including religious organizations, in the provision of services and that it did not adequately emphasize the value of abstinence from premarital sex, or promote adoption as an alternative to abortion.[3]

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[2] Pub. L. No. 95-626, tit. VI, 92 Stat. 3595 (repealed October 1, 1981).

[3] *See* S. Rep. No. 161, 97th Cong., 1st Sess. 4 (1981); 127 Cong. Rec. 8266 (1981) (remarks of Sen. Hatch); Letter to President Reagan from Sens. Hatch, Denton, East, and Nickles (Aug. 1981)

AFLA met these perceived deficiencies in Title VI. First—and central to this case—AFLA included a requirement that applicants for funds describe how they would,

> "as appropriate in the provision of services . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector . . . ."

42 U.S.C. § 300z-5(a)(21). Second, AFLA authorized grants not only to provide care services for pregnant adolescents, but also to provide services necessary to prevent adolescent pregnancy. *Id.* § 300z-1(a)(8). These "prevention services" were to emphasize sexual abstinence rather than contraception as the means to prevent pregnancy. *See id.* § 300z-1 (a)(4)(G); *id.* § 300z-3(b). Finally, AFLA barred grantees from using AFLA funds to promote or encourage abortion or to provide abortion referrals—unless requested by both the adolescent and his or her parents. *Id.* § 300z-10. Grantees were directed to encourage adoption in lieu of abortion. *Id.* § 300z-1 (a)(4)(B); *see also id.* § 300z(b)(2).

2. Plaintiffs challenged AFLA not only on its face but also as applied. Evidence concerning AFLA's application centered on the Office of Adolescent Pregnancy Program (OAPP), the agency within the U.S. Department of Health and Human Services (HHS) responsible for administering AFLA.

The Director of OAPP selected 72 "external field readers" to review and rank applications. Joint Appendix ("J.A.") at 95. Twenty-nine of these readers either were employed by religious organizations or had close ties with such organizations.[4] Many readers indicated by

(attached as Exhibit A to Plaintiffs' Memorandum in Response to District Court's Order of April 15, 1987 In Opposition to Severance).

[4] R. 155, Vol. 1, at 29-34; *see also* J.A. at 98.

written comments on application scoring sheets that they favored programs contemplating an overtly religious approach to counseling adolescents, and disfavored proposals *lacking* a religious (or an affirmatively anti-abortion) approach. For example, one reader criticized an application as follows: "There is missing a decided pro-life commitment in this proposal . . . . Lacking is the kind of counseling that you get in Catholic Social Service, for example." J.A. at 509. Another reader criticized a proposal for containing "[n]o experts on transcendental (the most effective) Judeo-Christian values." J.A. at 511.

The record further established that awards were approved for programs that employed explicitly religious curricula. For example, one grantee, St. Ann's Infant and Maternity Home, made available to program participants a book that discusses contraception and abortion in these terms:

> "For the believer, contraception represents the mentality of those who under pressure of their own sexual desires, or the sexual desires of partners they would rather please than lose, have blocked out the demands of faith in God, who gave man the intelligence and willpower to control his sexuality and regulate his family naturally, lovingly. For the unbeliever, contraception represents the mentality of those who have lost faith in man's ability or willingness to control himself, to love.
>
> . . . .
>
> No one has a right to have sex when there is no mutual intention to cherish, safeguard, protect and provide for the life that may be conceived. Abortion merely compounds the evil by adding the willful termination of an innocent life to irresponsible sexual intercourse."

J. McGoey, *Sex, Love and the Believing Girl* (J.A. at 336, 357, 360-61).

Religious views on sexuality also were presented in other AFLA-funded programs.[5] Some AFLA programs conducted by religious grantees took place in conjunction with programs of religious instruction.[6] The Government acknowledges that some AFLA programs included religious instruction and that other "departures from proper constitutional principles" took place. U.S. Brief at 40.

G..ntees and subgrantees included at least ten religious organizations that submitted statements of purpose or articles of incorporation dedicating them to promoting the tenets of their religion.[7] While some of these organizations' AFLA-funded programs were conducted in such secular settings as public schools,[8] others were conducted on religious sites adorned with religious symbols, including parochial schools, churches, and parish halls.[9] They were often publicized to, and conducted for the exclusive benefit of, members of a single denomination.[10]

Until 1984, OAPP made almost no attempt to discourage the use of AFLA funds by sectarian organizations to teach religion. After this lawsuit was filed in late

[5] *See, e.g.*, J.A. at 269-76 (Catholic Charities of Arlington); J.A. at 410-30 (St. Margaret's Hospital); J.A. at 559-60 (Catholic Family Service of Amarillo).

[6] *See, e.g.*, J.A. at 172-74, 206-09, 225-26, 253-54 (Catholic Charities of Arlington); J.A. at 568 (Northwest Regional Health Center).

[7] *See, e.g.*, J.A. at 155 (Catholic Family Service of Amarillo); J.A. at 376 (St. Ann's); J.A. at 385-90 (Families of America Foundation); J.A. at 572 (Cities in Schools); J.A. at 515-16 (St. Margaret's Hospital); J.A. at 562 (SEMO); *see also* J.A. at 608 (Boston Archdiocese).

[8] *See, e.g.*, J.A. at 401-29 (St. Margaret's Hospital).

[9] *See, e.g.*, J.A. at 153 (Catholic Family Service of Amarillo); J.A. at 170, 211 (Catholic Charities of Arlington); J.A. at 456 (CASI); J.A. at 401-29 (St. Margaret's Hospital); J.A. at 485 (Lyon County).

[10] *See, e.g.*, J.A. at 264 (Catholic Charities of Arlington); J.A. at 465 (St. Margaret's Hospital).

1983, OAPP wrote letters to three grantees advising them not to use AFLA funds for religious instruction and terminated one grantee for such uses. *See* J.A. at 671-76, 742-43. In 1984, HHS added to its Notice of Grant Award form a provision advising grantees not to use AFLA funds for religious purposes. J.A. at 514, 757-68. The government did not advise AFLA-funded religious organizations how they might disentangle their religious views from the public policies they were being paid to promote.

3. Plaintiffs filed suit in October 1983. They sought to enjoin funding under AFLA and to obtain a declaration that on its face and as applied AFLA violated the Establishment Clause.

Applying the three-part analysis of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the District Court held AFLA invalid "insofar as religious organizations are involved in carrying out the programs and purposes of the Act." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1570 (D.D.C. 1987). The court concluded that the statute had a valid secular purpose. *Id.* at 1558-60. But the court ruled that on its face and as applied AFLA had the primary effect of advancing religion. *Id.* at 1562-67. The court also determined that AFLA fostered excessive entanglement between the government and religion. *Id.* at 1567-69.

SUMMARY OF ARGUMENT

AFLA impermissibly directs that public funds be awarded to religious organizations to promote government policies that these grantees teach as articles of religious faith. Such direct promotion of religious dogma by government—paying religious entities to propagate religious doctrine—violates the Establishment Clause.

AFLA does not even purport to prohibit grantees from using public funds to promote religious teachings. Such

a prohibition in any event would pose insurmountable entanglement problems. Government officials would be required to assure that counseling by religious entities in matters of ultimate religious concern remained wholly secular.

The Government's attack on the judgment below amounts to a formalistic critique of a District Court's analytical protocol. The Government does not ultimately expose any flaw in the substance of the court's conclusion, nor could it. The substance of that conclusion—that AFLA funds can be and have been used for religious instruction—is clearly supported by the terms of the statute and overwhelming record evidence.

ARGUMENT

I. AFLA IMPERMISSIBLY ADVANCES RELIGION

This Court observed in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), that a law may impermissibly advance religion in three ways. *First*, a law may take a form that renders it readily susceptible to use for religious activities.[11] *Second*, a law may provide an "indirect subsidy" to religion when it funds activities that are closely related to the religious mission of "pervasively sectarian" recipients. *See id.* at 392-97, 394 n.12. *Third*, a law may afford a symbolic benefit to religion when it gives rise to an appearance of joint action by governmental and religious authorities. *Id.* at 389-92. *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

[11] In *Grand Rapids*, the Court struck down state aid for educational programs in parochial schools because, among other reasons, "teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U.S. at 385. *See also Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971).

The District Court correctly found AFLA deficient in each of these respects.[12]

A. AFLA Permits Government Funds To Be Used To Teach Religion

Establishment Clause jurisprudence is characterized by "few absolutes," but it *does* absolutely prohibit government-financed "indoctrination into the beliefs of a particular religious faith." *Grand Rapids*, 473 U.S. at 385. Accordingly, this Court has consistently struck down aid to religious organizations that is susceptible to use for religious instruction.[13] It has concluded, in particular, that financial subsidies for education and counseling of youth are inherently susceptible of such uses.[14] No means,

[12] Although the Court need not address the issue of AFLA's purpose to affirm the District Court's judgment, the *Amici* joining in this Brief believe that the District Court should have found that AFLA was enacted for the impermissible purpose of advancing religion, for the reasons set forth in the brief *amicus curiae* of the Committee for Public Education and Religious Liberty.

[13] *See, e.g., Grand Rapids*, 473 U.S. at 385-89; *Wolman v. Walter*, 433 U.S. 229, 248-55 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-72 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-94 (1973); *Sloan v. Lemon*, 413 U.S. 825, 828-31 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-82 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971). *See also Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (upholding reimbursement to religious schools for costs of state-required testing while noting that "under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services").

[14] *See, e.g., Wolman*, 433 U.S. at 250 (loan of instructional equipment and material to religious schools "*inevitably* flows in part in support of the religious role of the schools") (emphasis added); *Meek*, 421 U.S. at 366 (aid to educational function of religious schools "*necessarily* results in aid to the sectarian school enterprise as a whole") (emphasis added); *Nyquist*, 413 U.S. at 774 (finding it impossible to restrict state aid for maintenance and repair of

however carefully crafted, can provide the guarantee required by the Establishment Clause that aid in this form will be used *solely* for secular purposes. *See Meek*, 421 U.S. at 366; *Nyquist*, 413 U.S. at 779; *Lemon*, 403 U.S. at 617.

Under this case law, AFLA is invalid on its face. It is undisputed that, by mandating that applicants "involve" religious organizations in carrying out its program, AFLA contemplates that those organizations will receive federal funds. 42 U.S.C. § 300z-5(a)(21)(B); *Kendrick*, 657 F. Supp. at 1562. Furthermore, AFLA requires grantees to promote chastity and adoption as an alternative to abortion—without even purporting to assure that those policies will not be taught as, or confused with, religious precepts.

Religious grantees are bound to use AFLA aid to further religious teaching. Premarital sexual abstinence and abortion touch matters at the core of religious doctrine.[15] Moreover, they provoke "continuing debate" among religious denominations.[16] As the District Court noted, "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic." 657 F. Supp. at 1563.

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religious schools to secular purposes); *Lemon*, 403 U.S. at 617; *cf. Levitt*, 413 U.S. at 480 ("no means are available" to ensure that funding for internally prepared tests at religious schools "are free of religious instruction").

[15] *See* J.A. at 590-602 (affidavits of experts in theology).

[16] *See Walz v. Tax Commission*, 397 U.S. 664, 695 (1970) (separate opinion of Harlan, J.) (recognizing that birth control and abortion laws are issues of "continuing debate" among religious denominations); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 99 (1980) (separate opinion of Powell, J.) (views favoring abortion would be "morally repugnant" to "church-operated enterprises").

The Government argues that "[o]utside the context of a pervasively sectarian institution, there is no authority in this Court's cases for presuming that religiously affiliated organizations will deliver otherwise secular services in a manner that makes them specifically religious." U.S. Brief at 38. This is incorrect. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court applied just such a presumption in striking down a 20-year limit on the "secular purposes" restriction on federal construction grants to religious colleges and universities:

> "Limiting the prohibition for religious use of the structure[s] to 20 years obviously opens the facility to use for any purpose at the end of that period. . . . If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion. To this extent the Act therefore trespasses on the Religion Clauses." *Id.* at 683.

The Court applied this presumption even though it determined that the religious colleges and universities receiving the grants were not "pervasively sectarian." *Id.* at 680-82. Aid to non-"pervasively sectarian" organizations may be permissible when the use of such aid is restricted to secular activities. However, when the use of such aid is not so restricted, it is proper to presume that the aid will be used to advance religion. *Cf. Roemer v. Maryland Public Works Board*, 426 U.S. 736, 746-48 (1976).

Moreover, the Government's assertion that it cannot be presumed that AFLA funds will be used to teach religion is sheer fantasy in the context of aid to promote values at the core of religious doctrine. Grants to promote these values surely present a greater potential for inculcation of religious views than does aid for "remedial arithmetic" or "medieval history." *Cf. Meek*, 421 U.S. at 371. And in fact these grants have been used to teach religion, as the Government admits (U.S. Brief at 40-41) and the District Court found (657 F. Supp. at 1567). The Gov-

ernment lamely attempts to dismiss the numerous instances of such religious uses as "not representative." U.S. Brief at 41. But this excuse presupposes a rule so indefensible that it cannot forthrightly be declared—that "minor encroachments" on the Establishment Clause need not trouble this Court. *See Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

Because AFLA by its terms allows religious grantees to use grants of public funds to teach religion, and because AFLA grants have been so used, the statute violates the Establishment Clause on its face and as applied.

B. AFLA Funds Sectarian Organizations To Promote Values at the Core of Their Religious Dogma and at the Center of Religious Debate

Aid to religious organizations that is not used for explicitly religious instruction nonetheless advances religion when it supports activities that "go[] hand in hand" with the religious mission of "pervasively sectarian" recipients. *See Grand Rapids*, 473 U.S. at 384.[17]

As the District Court found, AFLA supports activities that do not merely "go[] hand in hand" with the religious mission of religious grantees; they are an *integral part* of that mission. 657 F. Supp. at 1562-63. AFLA requires grantees to promote the values of premarital sexual abstinence over contraception and adoption over abortion. 42 U.S.C. §§ 300z(b)(2), 300z-1(a)(4)(B), (G), 300z-3(b), 300z-10. Certain denominations hold these values as fundamental religious tenets and are dedicated to promoting them as such. As to these grantees, the District Court concluded, the activities supported by AFLA and the organizations' religious mission were one and the same. 657 F. Supp. at 1562-63. Therefore, it is clear on the face of the statute that AFLA advances the religious mission of these religious grantees.

[17] *Accord Wolman*, 433 U.S. at 250; *Sloan v. Lemon*, 413 U.S. at 830-32; *Levitt*, 413 U.S. at 479-80; *see also Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

The Government argues that AFLA cannot on its face be construed to advance the religious mission of grantees because it does not by its terms "require" that "pervasively sectarian" organizations be funded. U.S. Brief at 30. This argument is obviously wrong. The Court has often found facially invalid laws that did not expressly require support to "pervasively sectarian" organizations, if such organizations were in fact supported. In *Sloan v. Lemon*, 413 U.S. 825 (1973), for example, the Court struck down on its face a state law providing tuition reimbursements to parents who sent their children to "nonpublic" schools. *Id.* at 828. In an argument repeated here by the Government, the state maintained that, since the law did not *require* reimbursements be paid to religious schools, "no assumption [could] be made as to how individual parents [would] spend their reimbursed amounts." *Id.* at 831 (footnote omitted).[18] The Court, of course, rejected that argument.

The District Court in fact found that, as applied, AFLA funded a significant number of AFLA grantees that were "pervasively sectarian."[19] The record amply supports this finding. The AFLA programs of many religious grantees were directed by members of religious orders who were answerable to church officials. *See, e.g.*, J.A. at 297. The instructors were, in many cases, themselves members of religious orders, or otherwise subject to the control of religious authorities. *See, e.g.*, J.A. at 549-53. The AFLA programs of religious grantees were

[18] *See also Wolman*, 433 U.S. at 234-35, 248-51; *Nyquist*, 413 U.S. at 767-69; *Levitt*, 413 U.S. at 474-76, 480.

[19] *Kendrick*, 657 F. Supp. at 1564 ("AFLA has in fact . . . funded 'pervasively sectarian' institutions . . . ."); *id.* at 1566-67 ("[D]efendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for . . . a benefit to a 'pervasively sectarian' institution, or the use of tax dollars to 'teach' religion.").

often conducted on sites adorned with religious symbols, including parochial schools, *see, e.g.*, J.A. at 467, and, on a few occasions, in conjunction with programs of religious instruction, *see, e.g.*, J.A. at 568. A large proportion of the individuals attending some of these programs belonged to the denomination with which the grantee was affiliated. *See, e.g.*, J.A. at 211-12, 264. In short, numerous AFLA grantees had all of the attributes of institutions that traditionally have been found to be "pervasively sectarian" by this Court. *Cf. Wolman*, 433 U.S. at 234-35.

The District Court's examination of the record also confirmed that, as applied, AFLA funded organizations whose stated purpose was to promote religious doctrines proclaiming the impropriety of abortion and contraception. One AFLA grantee, for example, stated that its existence was inspired by the Encyclical *Humanae Vitae*. That is the document of the Roman Catholic Church that establishes the propriety of abstinence and the impropriety of abortion and contraception as fundamental tenets of church doctrine. 657 F. Supp. at 1565. The court determined that at least ten AFLA grantees or subgrantees were similarly dedicated to promoting religious doctrines that require abstinence and forbid abortion as matters of faith. *Id.* As applied, the court concluded, AFLA advanced the religious mission of these grantees.

In attacking the District Court's "as applied" analysis, the Government dismisses as irrelevant the link between the values that AFLA was enacted to promote and the religious doctrine that religious grantees are dedicated to promoting. U.S. Brief at 33, 36. This approach not only is grandly naive; it relies on cases involving action by *government* entities—not action by *religious* organizations.[20] These cases clearly do not apply when *religious*

[20] *Harris v. McRae*, 448 U.S. 297, 319 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *see also Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983).

groups are enlisted to promote values which, for these groups, are religiously inspired.

There is a vast difference, for example, between the government's enforcement of Sunday Closing Laws and government funding of religious organizations to enforce those laws. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Here, as in *McCollum v. Board of Education*, 333 U.S. 203 (1948), there is "direct cooperation between [government] officials and religious [authorities]," in the promotion of religious doctrine. *McGowan*, 366 U.S. at 452 (distinguishing *McCollum* on this basis).

Indeed, cooperation between government and religion in the promotion of religious doctrine lies at the heart of AFLA. Congress explicitly referred to the "complex . . . moral dimensions" of adolescent pregnancy to justify the involvement of religious groups.[21] Congress also expressly acknowledged the peculiar effectiveness of these groups in promoting the values prescribed in AFLA.[22] These determinations reflect Congress's intent to use these groups' religious faith to achieve the statute's objectives. This is far removed from cooperation between government and religious organizations in the delivery of nonideological, religiously neutral welfare services. *See, e.g., Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *see also Wolman*, 433 U.S. at 244.

Because AFLA supports activities at the core of religious grantees' religious mission, the only remaining question is whether this aid is "direct and substantial." *Grand Rapids*, 473 U.S. at 393; *Wolman*, 433 U.S. at 250. If aid in the form of teachers and instructional material

[21] S. Rep. No. 161, *supra* note 3, at 15-16 ("Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions, the committee believes that promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal.").

[22] S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984).

to religious institutions is "direct and substantial" aid prohibited by the Establishment Clause,[23] there can be no doubt that the aid provided by AFLA—cash grants to religious entities for education and counseling—is "direct and substantial." This is the form of aid "most clearly prohibited under the Establishment Clause." *Grand Rapids*, 473 U.S. at 395; *see also Lemon*, 403 U.S. at 616-20.

C. AFLA Creates a Crucial Symbolic Link Between the Government and Religion

A symbolic benefit to religion follows inexorably from Congress's decision to fund the promotion of values by religious organizations that hold those values as matters of religious faith. Congress's decision may have rested on a determination that religious organizations were particularly effective in providing guidance on the "complex moral and social dimensions" of premarital sex and abortion. But just as the words of the servant are imputed to the master, so the voice of an AFLA-funded religious entity is heard as the voice of civil authority.[24] Such a message of governmental endorsement of religious values violates a "core purpose" of the Establishment Clause. *See, e.g., Grand Rapids*, 473 U.S. at 389; *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

AFLA directs its message at youth, who are especially likely to feel its influence. *See Grand Rapids*, 473 U.S. at 390; *see also Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985). On its face, the statute limits services primarily to those eighteen years old and younger. 42 U.S.C.

[23] *See Grand Rapids*, 473 U.S. at 395 (aid in the form of teachers and instructional equipment); *Wolman*, 433 U.S. at 248-51 (instructional materials); *Meek*, 421 U.S. at 365-72 (same).

[24] *Cf. McCollum*, 333 U.S. at 227-28 (separate opinion of Frankfurter, J.).

§§ 300z(b), 300z-1(a)(2), (9). The record indicates that several religious grantees targeted audiences much younger than 18. For example, St. Margaret's Hospital offered AFLA programs to children in kindergarten through sixth grade (J.A. at 465), and Catholic Charities of Arlington, Virginia conducted AFLA program for junior high school students (J.A. at 212).

Distinct from the impermissible symbolic benefit accorded by AFLA to religion in general is the offense of AFLA's support for the creeds of particular denominations. The values that AFLA requires grantees to promote—favoring premarital sexual abstinence over contraception and adoption over abortion—are ones over which various religious denominations sharply disagree. *See Walz*, 397 U.S. at 695 (separate opinion of Harlan, J.). AFLA on its face takes sides on these issues. This by itself is not impermissible. But in making funds available to religious organizations to teach on these issues, AFLA inevitably excludes from participation religious organizations whose faith requires them to promote views that do *not* conform with AFLA's values.[25] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

In sum, the resulting message of disparagement of certain religions and endorsement of others arises not merely from the government's promotion of values that conform with those of certain denominations. It arises as well from the government's enlistment in a public undertaking of those religious organizations whose faith will make them particularly effective at promoting these values. The First Amendment "rests upon the premise

[25] *See, e.g.*, J.A. at 603-04 (affidavit of Director of the Religious Coalition for Abortion Rights).

that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212. *Accord Aguilar* v. *Felton*, 473 U.S. 402, 410 (1985). AFLA rests on an altogether different premise.

II. AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION

A. AFLA's Impermissible Effects Are Unavoidable

The impermissible effects of AFLA grants to religious organizations could not be avoided even if the statute purported to prohibit the use of the grants for religious instruction. This Court has consistently held that direct aid for education and counseling of youth "inevitably" advances the religious mission of religious recipients, regardless of purported restrictions on its use. None of the authority relied on by the Government contradicts this principle.

The Government's reliance on decisions involving aid to religious organizations for religiously neutral welfare services is misplaced. Such services—diagnostic health testing, for example—comprise only a minor part of AFLA activities. Certainly, religious organizations were not included in AFLA because they were "particularly effective" in performing such tasks. Instead, the dominant purpose of AFLA funding was to enlist religious entities in providing "guidance" that will encourage adolescents to abstain from sex and choose alternatives to abortion.[26] Precedent concerning aid to religious organizations for social welfare services does not apply in the context of education and counseling.[27]

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[26] *See* 42 U.S.C. § 300z(b)(1), (2); S. Rep. No. 161, *supra* note 3, at 7-8, 20.

[27] As the Court has stated:

> "The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship . . . does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student."

Wolman, 433 U.S. at 244. *See also Meek*, 421 U.S. at 371.

The Government's reliance on decisions involving aid to religious organizations for higher education is likewise misplaced. Those decisions rely on factual and legal circumstances not present here. Specifically, in the college aid decisions instruction took place "in an atmosphere of academic freedom rather than religious indoctrination," and the recipients of aid were not otherwise "pervasively sectarian." *Roemer*, 426 U.S. at 750, 755-56.[28] Thus, it was the non-"pervasively sectarian" character of the institutions—which was manifested by, among other things, their dedication to intellectual openness—that rendered express statutory prohibition on religious uses enforceable.[29] In sharp contrast, many of the religious entities that have received AFLA funds were "pervasively sectarian."

Moreover, unlike the laws involved in the college aid decisions, AFLA does not even purport to prohibit the religious uses of funds. Nor does it purport to promote intellectual openness. In fact, the structure of the statute is antithetical to freedom of inquiry. Discussion of the positive aspects of abortion is absolutely prohibited under

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[28] *See also Hunt v. McNair*, 413 U.S. 734, 736 (1973); *Tilton*, 403 U.S. at 686-87.

[29] *See Roemer v. Maryland Public Works Board*, 426 U.S. 736, 756 (1976); *Tilton*, 403 U.S. at 686; *cf. Widmar v. Vincent*, 454 U.S. 263 (1981).

the statute, and so in most cases is discussion of contraception.[30] Moreover, AFLA's administrators construed and applied these restrictions with a vengeance. For example, grantees were advised by OAPP that they "should not even know how to *spell* the word abortion" (J.A. at 93 (emphasis added)), even though the statute permits abortion referrals under certain conditions. *See* 42 U.S.C. § 300z-10. Finally, religious grantees, as the Government puts it, "are agreeable to the[se] restrictions by virtue of their religious beliefs." U.S. Brief at 33 (footnote omitted). This is understatement in the extreme. Many religious grantees by virtue of their beliefs refused to provide complete information on contraception and abortion even in the limited circumstances permitted under the statute.[31]

B. Any Attempt To Avoid AFLA's Impermissible Effects Would Violate the Principle of Nonentanglement

Any attempt to prohibit religious uses of AFLA funds would entail excessive entanglement between government and religion. Like AFLA, the laws struck down in *Lemon* provided financial subsidies directly to religious organizations for education and counseling of youth by instructors subject to the control of religious authorities. *See* 403 U.S. at 607-10. Like AFLA religious grantees, the recipients of the aid in that case were affiliated with

[30] 42 U.S.C. §§ 300z-3(b), 300z-10; S. Rep. No. 161, *supra* note 3, at 13, 20.

[31] *See, e.g.*, J.A. at 300, 310-11 (St. Ann's would not provide abortion referrals or information on contraception because of Catholic Church doctrine); J.A. at 314-17 (grant proposal of St. Ann's proposed to teach only the hazards of those birth control methods which were not approved by the Catholic Church); J.A. at 379-82 (Family of Americas Foundation's AFLA curriculum taught only negative aspects of abortion); J.A. at 407-09 (for religious reasons, St. Margaret's would not provide abortion referrals under any circumstances).

churches and dedicated to promoting the teachings of their church. *Id.* at 615-16, 620. They provided instruction, as have many AFLA-funded religious grantees, in pervasively sectarian settings. *Id.* at 615. Thus, in this case, as in *Lemon*, in order to prohibit religious uses of government aid, "comprehensive, discriminating, and continuing . . . surveillance [would] inevitably be required . . . . These prophylactic contacts [would] involve excessive and enduring entanglement between state and church." *Id.* at 619.

The degree of surveillance necessary under AFLA would likely be greater than that found excessive in *Aguilar v. Felton*, 473 U.S. 402 (1985). That decision reviewed the use of federal funds to pay the salaries of publicly employed professional educators who taught in parochial schools. These sorts of instructors are surely less likely to engage in religious instruction than are the members of religious orders and employees of religious organizations who conduct many AFLA programs. *See id.* at 427 (O'Connor, J., dissenting).[32]

AFLA's invalidity under an entanglement analysis follows directly from *Lemon* and *Aguilar*, since the subject matter of AFLA instruction concerns values at the core of religious doctrine. Such subject matter creates a greater potential for presentation of religious views than does the traditional subject matter involved in *Aguilar* or *Lemon*. It would entail correspondingly more intense surveillance.

This level of surveillance inevitably would give rise to both of the concerns underlying the nonentanglement principle. *See Aguilar*, 473 U.S. at 409-10. As government involvement in the affairs of those denominations whose views conform to statutorily prescribed views increases, the exclusion of denominations with nonconforming views becomes more apparent, and hence more degrading. At

[32] *Accord Meek*, 421 U.S. at 394 (Rehnquist, J., concurring in judgment and dissenting in part).

the same time, the freedom of those denominations with whom the government is involved also suffers. As the District Court recognized, even if it were possible to require AFLA counselors to put aside their religious beliefs when counseling adolescents, "government would tread impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine." 657 F. Supp. at 1563 (emphasis in original). The effect is the forced "secularization of a creed." *Lemon*, 403 U.S. at 650 (Brennan, J., concurring).

Moreover, surveillance of religious AFLA grantees would breed an especially pernicious form of political divisiveness. The site of this surveillance would include not only parochial schools, as in *Lemon* and *Aguilar*, but also public schools, for religious grantees operate in both settings. The latter location, as much as the former, is an inappropriate environment for "numerous judgments [by public officials] . . . that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." *Aguilar*, 473 U.S. at 414. The prospect of religiously inspired disputes erupting in institutions of public education poses a severe threat not present in *Lemon* or *Aguilar*. " 'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.' " *Edwards v. Aguillard*, 107 S. Ct. 2573, 2577-78 (1987) (quoting *McCollum*, 333 U.S. at 231 (separate opinion of Frankfurter, J.)).

AFLA also creates the more typical form of political divisiveness that has troubled the Court. It sets nonreligious education authorities against religious ones in a battle for scarce government education aid.[33] AFLA

[33] *See, e.g., Meek*, 421 U.S. at 365 n.15; *Nyquist*, 413 U.S. at 794-98; *Tilton*, 403 U.S. at 688-89; *Lemon*, 403 U.S. at 622-25;

affords religious organizations a distinct advantage in this competition by restricting discussion of contraception and abortion. These restrictions are at once "agreeable" to religious groups by virtue of their religious faith, U.S. Brief at 33, and repugnant to nonreligious education groups committed to evenhanded discussion that takes into account the religious and cultural diversity of those whom they serve. Thus, education by religious agencies is nourished at the expense of education by secular agencies.

In short, because AFLA unites government and religion in the promotion of values that lie at the heart of religious doctrine and at the fulcrum of denominational differences, it encourages the strife which the framers intended the Establishment Clause to prevent. "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against." *Walz*, 397 U.S. at 695 (separate opinion of Harlan, J.).

C. AFLA Does Not Even Attempt To Prohibit Religious Uses of Public Funds by Religious Bodies

It is appropriate to analyze the level of government interference with religion that would be necessary to prevent the use of AFLA funds for religious purposes. *See, e.g., Meek*, 421 U.S. at 369-72. This analysis should not, however, obscure the fact that AFLA contains no such restrictions. Assuming for the moment that such restrictions were enforceable, the absence of a statutory prohibition of religious uses itself requires invalidation of

Walz, 397 U.S. at 698-700 (separate opinion of Harlan, J.); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

AFLA, regardless whether religious AFLA grantees are deemed "pervasively sectarian." *See Tilton*, 403 U.S. at 682-84.[34] Neither resort to a brief, isolated remark in a committee report nor informal adoption of an agency restriction cures this defect. "[W]here Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.'"[35] The Court cannot save AFLA by construing it to imply a condition that Congress did not see fit to insert.

CONCLUSION

For the foregoing reasons, the judgment of the District Court holding AFLA invalid insofar as it involves religious organizations should be affirmed.

Respectfully submitted.

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[34] *Accord Roemer*, 426 U.S. at 759-61; *Hunt v. McNair*, 413 U.S. 734, 744 (1973).

[35] *School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1132 (1987) (Rehnquist, J., quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)) (dissenting opinion).